No. 2051

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United States

Circuit Court of Appeals

For the Ninth Circuit.

ELIAS MARSTERS and E. F. LAKIN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellants

Appeal from the United States District Court for the District of Idaho, Southern Division.

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Attorney General of the State of Idaho.
E. G. DAVIS,
T. C. COFFIN,
HERBERT WING,
Solicitors for Appellants.
E. G. DAVIS,
Of Counsel.

SYMS-YORK CO., PRINTERS & BINDERS, BOISE

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STATEMENT OF THE CASE.

The Boise River is a stream emptying into the Snake River in Canyon County, Idaho, the waters of which are used for the purpose of irrigation in Ada and Canyon Counties.

The United States is an appropriator of water from this river for the irrigation of lands included within the Boise Irrigation project.

There are one hundred and thirty-four appropriators whose rights are prior in time to the right of the United States.

The United States in this proceeding must be regarded as any other appropriator, and its rights in the waters of the Boise River determined under the law which regulates the acquiring of priorities in the waters of this state. (Memorandum Decision on Demurrer, Transcript pp. 19-24).

The right of the United States to the waters of Boise River is evidenced by a certificate of the State Engineer of the State of Idaho, under which was acquired the right to use 1647 second feet of the waters of Boise River, under date of priority of December 4, 1903. The right under this certificate does not represent an absolute right to the said amount of water or to any other given amount, but only the right to use that amount if it can be obtained after all other prior rights are fully satisfied. We believe there can be no dispute or controversy on this proposition.

Neilson vs. Parker, 19 Idaho 727, 115 Pac. 488.

Speer vs. Stevenson, 16 Idaho 707, 102 Pac. 365.

In the year 1902 an action was commenced in the District Court of the Seventh Judicial District of the State of Idaho for the purpose of having adjudicated the rights and priorities in the waters of the Boise River. Neither the United States nor its predecessors in interest were made parties to this action for the reason that their rights had not even been initiated when the action was commenced. In

January, 1906, a decree was entered in the said action, fixing the rights and priorities of all appropriators prior in time to the United States. The decision of the trial court was affirmed on appeal (Farmers' Co-operative Ditch Co. vs. Nampa, etc. Irr. Dist., 14 Ida. 450, 94 Pac. 761); but the matter later came before the Supreme Court of Idaho on appeal from an order denying a new trial asked for by certain parties to the action in the court below, and at this latter hearing the said Supreme Court specifically affirmed the finding of the trial court as to the "respective rights and priorities," but remanded the case for further hearing on the single question of the duty of water. Farmers' Co-operative Ditch Company vs. Riverside Irrigation District et al., 16 Idaho, 525, 102 Pac. 481.

In remanding the case for further hearing the court said:

> "After a somewhat extended and very careful examination of the record in this case, we are convinced that justice demands, and the record justifies, the granting of a new trial to the extent and for the purpose of determining the question as to the duty of water on the two classes of lands mentioned in this decree * * * The judgment will be affirmed as to the respective rights and priorities of the several claimants and appropriators whose rights have been litigated in this case. A new trial will be granted for the sole and only purpose of determining the duty of water on the two classes of lands in-

> volved in this action, namely, bench and bottom lands. * * * In the event the court, after hearing the evidence should determine upon fixing a higher duty for water than allowed by the former findings and decree, and to therefore reduce the amount per acre, it will modify the findings and decree as to each appropriator in proportion as it reduces the quantity per acre below that fixed in the former decree." Farmers' Co-operative Ditch Company vs. Riverside Irrigation District et al., 16 Idaho 525, at pages 535 and 538.

The case as thus remanded required the taking of a great mass of evidence, and it was still pending before the trial court at the time the alleged cause of action in this case arose.

It will thus be seen that prior to the time of the acts complained of in this case, there had been an adjudication of the waters of the Boise River claimed by appropriators prior in time to the United States; that the judgment of the trial court had been affirmed "as to the respective rights and priorities of the several claimants and appropriators whose rights have been litigated in this case;" and that the case had been remanded to the trial court for the "sole and only purpose of determining the duty of water on the two classes of lands involved in this action, namely, bench and bottom lands." The total amount of water thus adjudicated was 2755 second feet. (See Steward Decree, Plaintiff's Exhibit G.)

As set forth in the bill of complaint in this case, paragraphs XIII, et seq., it has been the yearly custom of the court before which this question as to the duty of water is pending to issue a temporary order, or decree fixing the duty of water for the irrigation season in which issued. This order had generally been issued in July after the water in the river had fallen to the point where it was necessary to limit somewhat the amount of water allowed to individual users in order that the crops depending on water from this source might be saved. The order in question was issued for the year 1913 on the 18th of July. (Plaintiff's Exhibit F.) These orders have invariably fixed the duty of water, for the latter, or shortage, part of each irrigation season only, at six-tenths of an inch per acre.

The defendant Elias Marsters was on the 11th day of July, 1913, the duly appointed and acting Water Commissioner of water division No. 3, of the State of Idaho, which division includes the Boise River. This division is created and defined by Section 3268, Revised Codes of Idaho. The defendant E. F. Lakin was the duly elected and acting water master in direct charge of the waters of the Boise River, at the point of diversion of the government canal.

Some time prior to July 11, 1913, Elias Marsters and E. F. Lakin, acting as Water Commissioner and Water Master, respectively, found that it was necessary to deprive the United States of a part of the

water which it was diverting at its dam in order that prior appropriators might be supplied with the water to which they were entitled. They first applied to the project manager to turn down a part of the water which was being diverted from the Boise River into the canal of plaintiff, and upon being refused, the Water Commissioner, Elias Marsters, acting under the advice of the Attorney General of the State of Idaho, and the Water Master, E. F. Lakin, went upon the property and headgates of the plaintiff and cut the locks fastening the said gates and proceeded to regulate the flow of water in plaintiff's canal.

The officers in charge of the Boise project of the plaintiff, refusing to recognize the authority of the Water Commissioner and the Water Master under his supervision, to regulate the waters of the Boise River, the Water Commissioner retained control of the gates of the plaintiff during the remainder of the irrigation season of 1913, or until October 3, 1913.

On July 12th, 1913, the plaintiff, through its attorneys, filed in the District Court of the United States for the District of Idaho, Southern Division, a bill of complaint in which the prayer asked for an injunction restraining the defendants from assuming control of the headgates of plaintiff as threatened and for Ten Thousand Dollars per day for each and every day that the water should be shut out of the plaintiff's canal, without reference to the amount of which it might be deprived or of the value of the said water

for the purpose to which it might properly have been applied.

On July 11th, 1913, the defendants assumed control of the headgates of the plaintiff, as above set out, and on November 1st, 1913, the plaintiff filed a supplemental bill of complaint in which there was a prayer for a permanent injunction against further interference with the headgates of plaintiff and for damage in the sum of forty-eight thousand dollars, alleged to have been sustained by reason of damage to the rental value of the irrigation works of plaintiff, loss of water for irrigation purposes, loss of water for power purposes and injury to the public lands of the United States.

The case came on duly for trial on the 10th day of June, 1915, before the court sitting without a jury, and judgment was rendered, awarding damages to the plaintiff in the sum of Eight Hundred Dollars for loss of water for irrigation purposes, and Two Hundred dollars for loss of water for power purposes.

From this judgment and from the whole thereof the defendants appeal to this court, and assign the following

SPECIFICATION OF ERRORS:

I.

The Court erred in holding that there is no decree of the waters of the Boise River which is effective for any purpose whatever.

II.

The Court erred in holding that, under the statutes of the State of Idaho, a Water Commission has no power, through a water master appointed by him or otherwise, to control the diversion gates upon a stream the rights in which have not been adjudicated or otherwise definitely determined.

III.

The Court erred in holding that the defendant, Elias Marsters, as Water Commissioner, had no authority, under the laws of the State of Idaho, to take possession of the gates of the plaintiff and to distribute the waters of the Boise River according to the rights which had been established thereon, whether by user, adjudication of court or otherwise.

IV.

The Court erred in holding that the water rights on the Boise River have not been adjudicated or otherwise definitely determined.

V.

The Court erred in denying defendants' motion to dismiss the bill of complaint filed by the plaintiff herein.

VI.

The Court erred in permitting plaintiff to file a supplemental bill of complaint herein.

VII.

The Court erred in entertaining jurisdiction and receiving evidence in this case which, in order to be

decided favorably to the plaintiff must necessarily involve an adjudication and determination of water rights and the duty of water in the Boise River, after the attention of the Court had been invited to the fact that the question of water rights and the duty of water in the said river was and for a long time prior thereto had been pending before the District Court of the 7th Judicial District of the State of Idaho, in a suit brought for the determination of that very question.

VIII.

The Court erred in awarding damages in any sum to the plaintiff for the loss of water for irrigation purposes, the evidence wholly failing to show that, at the stage of the river on the days when, as alleged, the plaintiff was deprived of water and after supplying all prior rights with the amounts to which they were entitled, there was any water in any amount in the Boise River which the plaintiff could lawfully divert at its headgates and claim as its own.

IX.

The Court erred in awarding damages in any sum to the plaintiff for the loss of water for irrigation purposes, the evidence showing affirmatively that on the 11th day of July, 1915, appropriators prior in time to the plaintiff were receiving from the Boise River much less water than the amount of their decreed rights, and that they were prevented from receiving the amount of their said decreed rights by the action of defendant in taking from the river more water than it was entitled to claim.

X.

The Court erred in awarding damages to the plaintiff in any sum for the loss of power which may have been developed at its power plant on the Boise River, since the evidence shows affirmatively that the action of the defendant resulted in an increased power development, and since there is no evidence whatever, showing or tending to show that the plaintiff had any right to the use of the waters of the Boise River for power development, or the extent of that right, if any exists, or that, if any such right exists, the said right had been in any way impaired.

XI.

The Court erred in holding that damages for loss of water could be awarded to plaintiff without a full showing that the plaintiff was actually entitled to water at the time or times in question, after all prior appropriators had been fully supplied with the several amounts to which they had become entitled, and the Court further erred in holding that this question could be determined without an adjudication of the duty of water and the number and amount of all prior appropriations of water on the Boise River.

XII.

The Court erred in holding that the plaintiff could collect damages for the loss of a given amount of water, there being no showing whatever that this alleged loss of water had resulted in loss of crops, or that the plaintiff could have sold the said water, of

which it alleges it has been deprived, even though it had been allowed to divert the same freely and without let or hindrance.

XIII.

The evidence is wholly insufficient and inconclusive to sustain a judgment for compensatory damages in any amount.

XIV.

The Court erred in holding that the plaintiff having introduced in evidence the so-called Stewart decree (Plaintiff's Exhibit G) was not bound by all matters covered by the said decree, and the customary distribution of water thereunder.

BRIEF OF ARGUMENT.

POINTS.

The specifications of error may be grouped under the following points which will be used as main heads in the argument which follows.

I.

At the time of the commission of the acts of defendants of which plaintiff complains, at the time of the commencement of the action in the court below and at the time of its trial, there was a valid and subsisting decree of the waters of the Boise River which it was the legal duty of defendants to enforce and which the plaintiff was bound to respect.

Under this point we consider particularly:

(a) The decree itself, when and where rendered.

(b) The action of the Supreme Court of Idaho on the said decree.

(c) The legal status of the decree at the time the alleged cause of action arose.

(d) The law which it was the legal duty of defendants to enforce.

This point is raised by Specifications of Error 1, II, III and IV.

II.

The trial court, in passing upon the motion to dismiss the bill of complaint (Memorandum Decision on Demurrer, Tr. of Record, pp. 19-24), quoted and applied as the law of the case, governing the standing of the parties, certain matter which had been the law of the State of Idaho prior to the year 1909, but which has been repealed by the Legislature in that year, and which was no part of the law of the State at the time the cause of action arose. The trial court also failed to consider and apply as the law of the case certain new matter which had been enacted in 1909, and which made the law of the case, as applicable to the parties before the court, radically different from what the court evidently supposed it to be.

This point is raised by Specifications of Error V. and VI.

III.

If it be true that at the time the cause of action in this case arose, there was no valid and subsisting decree of the waters of the Boise River, then the

trial court would be under the practical necessity of making findings equivalent to the entry of such a decree, before the right of plaintiff to the use of the water of which it claims to have been unjustly deprived could be established. The District Court of the 7th Judicial District of the State of Idaho having before it the question of the ascertainment of the duty of water on the Boise River and the application thereof to the priorities as established, the trial court in this case should have refused jurisdiction of any matter which either directly or indirectly involved the rights of prior appropriators.

This point is raised by Specification of Error VII.

IV.

Before the plaintiff is entitled to damages for loss of the use of water for irrigation purposes, it must clearly establish its right to such use. Such rights can only be established by showing that after all prior appropriators had been supplied with the water to which they were entitled, there was still sufficient water in the source of supply to furnish plaintiff with the quantity which it was diverting at the time in question and of which it claims to have been unlawfully deprived.

This point is raised by Specifications of Error VIII, IX, and XI.

V.

Before the plaintiff is entitled to damages for loss of the use of water for power development, it must clearly establish that the act complained of has re-

sulted in an actual loss of power. If it should appear that by reason of the act complained of more power has actually been developed than would have been the case if the act had not been committed, the plaintiff has entirely failed to establish any ground whatever for the award of damages.

This point is raised by Specification of Error X.

VI.

Where plaintiff diverts water for sale or rental, the amount of money received depending upon the measured quantity of water actually delivered, it must, before it can establish a right to damages for the loss of a part of its water, show by competent evidence that the water would have been actually sold if not interfered with and the purchase or rental value realized.

This point is raised by Specification of Error XII.

VII.

In an action for damages resulting from the loss of water damages can not be awarded upon evidence which is wholly insufficient and inconclusive to establish the right claimed to have been violated or the amount of the loss.

This point is raised by Specification of Error XIII.

I. *At the time of the commission of the acts of defendants of which plaintiff complains, at the time of the commencement of the action in the court below, and at the time of its trial, there was a valid and*

subsisting decree of the waters of the Boise River which it was the legal duty of defendants to enforce, and which the plaintiff was bound to respect.

(a) The decree itself, when and where rendered.

An action was instituted by the Farmers' Co-operative Ditch Company against numerous appropriators of water from the Boise River, for the purpose of adjudicating the priorities among the several appropriators. The complaint was filed August 20, 1902, in the District Court of the 3rd (now the 7th) Judicial District of the State of Idaho, in and for the County of Canyon. The defendants answered and also filed cross-complaints setting up their several rights, appropriations and priorities, and asking for affirmative relief decreeing their several appropriations and the times from which they should date.

On January 18, 1906, findings of fact and conclusions of law and judgment were made and entered. (See statement of the case in Farmers' Co-operative Ditch Company vs. Riverside Irrigation District, et al., 14, Idaho 450, 94 Pac. 761.

(b) The action of the Supreme Court of Idaho on the said decree.

From the findings and decree of the district court as entered in this case, the Nampa and Meridian Irrigation District, one of the parties to the said action, prosecuted an appeal to the Supreme Court of the State of Idaho. The Supreme Court of the State of Idaho, acting upon this appeal, held that the judg-

ment of the trial court should be affirmed, and it was so ordered. Farmers' Co-operative Ditch Co. vs. Riverside Irrigation District, et al., 14 Ida. 450, 94 Pac. 761.

In due course of time, the subject matter of this case again came before the Supreme Court of Idaho on an appeal from an order denying a new trial which was asked for by certain parties to the action in the trial court, and on passing upon the case as thus presented for the second time, the Supreme Court of Idaho specifically affirmed the respective rights and priorities of the several claimants and appropriators whose rights had been litigated in this case, and directed a new trial for the sole and only purpose of determining the duty of water on the two classes of lands involved in the action, namely bench and bottom lands. In so sending the case back to the trial court for further evidence on the one point indicated, the Supreme Court of Idaho was careful to say as follows:

> "In the event the court, after hearing the evidence, should determine on fixing a higher duty for water than allowed by the former findings and decree, and to therefore reduce the amount per acre it will modify the finding and decree as to each appropriator in proportion as it reduces the quantity per acre below that fixed in the former decree." Farmers' Co-operative Ditch Co. vs. Riverside Irrigation District et al., 16 Ida. p. 538.

(c) The legal status of the decree at the time the alleged cause of action arose.

In his memorandum decision on demurrer, Tr. of Record, pp. 19-24, the court below said:

> "It cannot be held that there is any decree adjudicating the waters of the Boise River. By reason of the reversal or modification by the Supreme Court of the decree originally entered in the suit referred to it is ineffective for any purpose. The prime requisites of any decree in a water right suit are both the date and the amount of the appropriation. As the decree in the case referred to now stands it only fixes the date of the appropriation."

It is contended by defendants that in so holding the court below entirely misunderstood and misconstrued the decision of the Supreme Court of Idaho to which reference was made. As indicated above, a decree adjudicating the waters of Boise River had been rendered in 1906. This decree was introduced in evidence by the plaintiff in this case, and is marked Plaintiff's Exhibit "G."

As above stated, at the time that matter was before the Supreme Court of Idaho on Appeal from an order denying a new trial, the case was remanded to the trial court for the taking of further evidence on the question of the duty of water on the two classes of lands involved in the case. In its decision remanding the case, the Supreme Court of Idaho laid down three propositions which appear to us absolutsly controlling, both as to the meaning to be attributed to the decision of the court, and as to the

present status of the Boise River, with reference to the adjudication or non-adjudication of its waters: These three propositions are as follows:

1. "After a somewhat extended and very careful examination of the record in the case, we are convinced that justice demands, and the record justifies, the granting of a new trial to the extent and for the purpose of determining the question as to the duty of water on the two classes of land mentioned in the decree." Farmers' Co-operative Ditch Company vs. Riverside Irrigation District et al., 16 Idaho at page 535.

2. "The judgment will be affirmed as to the *respective rights and priorities* of the several claimants and appropriators whose rights have been litigated in this case. *A new trial will be granted for the sole and only purpose of determining the duty of water on the two classes of lands involved in this action, namely, bench and bottom lands.*" (Same case, page 535.)

3. "In the event the court, after hearing the evidence, should determine upon fixing a higher duty for water than allowed by the former findings and decree, and to therefore reduce the amount per acre, it will modify the finding and decree as to each appropriator in proportion as it reduces the quantity per acre below that fixed in the former decree." (Same case, page 538.)

With all due respect to the opinion of the learned trial court, we desire to submit that there is no language found in the decision of the Supreme Court of

Idaho which can properly be construed as an indication that that court intended either to "reverse" or modify" the findings of the trial court which rendered the decree adjudicating the waters of the Boise River among the several litigants who were parties to the suit in question. It simply held in this respect that the affidavits submitted on the motion for a new trial and the character of the evidence taken at the trial were such as to warrant the court in ordering a new trial "for the purpose of determining the duty of water on the two classes of lands mentioned in the decree."

But while granting the new trial for the purpose indicated, the court was careful to say:

> "The judgment will be affirmed as to the respective rights and priorities of the several claimants and the appropriators whose rights have been litigated in this case."

It is somewhat difficult to understand, to say the least, how a water decree can be affirmed as to the "respective rights and priorities" of the parties to an action and it still be true, as held by the trial court in this case that there is no decree of said waters effective for any purpose whatever.

As though to emphasize what it had already said, the Supreme Court of Idaho, in the decision in question repeated:

> "A new trial will be granted for the sole and only purpose of determining the duty of water on the two classes of land involved in this action."

And then to make it absolutely clear that it had not modified the findings or decree of the trial court, it said:

> "In the event, the court, after hearing the evidence should determine upon fixing a higher duty for water than allowed by the former findings and decree, and to therefore reduce the amount per acre, it will modify the findings and decree as to each appropriator in proportion as it reduces the quantity per acre below that fixed in the former decree."

The language of the decision affords no justification for believing that the Supreme Court of Idaho intended to modify in any manner the findings of the trial court upon any single point included within the decree, or to leave the status of the Boise River so that it could be claimed that there was no decree of its waters "effective for any purpose," as was held by the trial court in this case. It believed that there should be further and better evidence taken on the question of the duty of water, and sent the case back to the trial court for that purpose. In the event, but only in the event the trial court, after hearing the additional evidence, should determine that a higher duty of water should be fixed, it was instructed to modify the finding and decree as to each appropriator. The inference is clear that if the trial court should not determine upon a higher duty of water, the decree as to the several appropriators should remain unchanged. It appears to us that nothing

could possibly be clearer considering the language used, than that the Supreme Court of Idaho intended by its decision to affirm the judgment and decree as rendered, subject only to being modified at a later date by the trial court as to the duty of water in the event the additional evidence to be taken should warrant such modification. The effect of the action was to give absolute finality to what had been done, except that jurisdiction was retained in the trial court to modify the findings and decree in one particular only, should further evidence warrant.

It is impossible to emphasize too strongly the importance of a correct holding upon this point. If as held by the trial court in this case, there is no decree of the waters of Boise River "effective for any purpose," it would seem to follow from this view of the case that the duly constituted and appointed officers of the State of Idaho are without jurisdiction to assume control of the distribution of such waters. If this be true, the laws of the State which were designed to protect all users of water upon any stream are practically set aside and orderly administration must give place to the rule of force under which each claimant may seize and hold all the water whose use he has the power to defend. The Boise River contains a large quantity of water, and supplies yearly some hundreds of thousands of acres for irrigation purposes. It is entirely clear that the Supreme Court of Idaho did not intend to undo all that had been done, and to again place the river in the same status as it had occupied before there had been any adjudication

whatever of the water rights thereon. How much fairer, and how muh more promotive of justice it would be to hold now, as the Supreme Court of Idaho evidently intended should be held, that the status of the waters of the Boise River should be regarded as absolutely fixed and adjudicated according to the decree rendered by the trial court in the case referred to, unless and until the said trial court should modify the said decree after the taking of further evidence on the question of the duty of water.

There is nothing inconsistent with this holding so far as we have been able to determine in any of the adjudicated cases bearing upon this question, and we feel that the trial court in this case was led to adopt the views expressed and which are quoted above through an erroneous impression that the Supreme Court of Idaho had of itself actually modified or reversed the findings of the trial court as to the duty of water.

It seems to us that the trial court was clearly in error in this matter, and since the entire case of plaintiff was predicated upon the theory that there was no decree of the waters of Boise River, it follows that the judgment should be reversed and the bill of complaint dismissed.

(d) The law which it was the legal duty of defendants to enforce.

The law applicable to the administration of the waters of Boise River is in large part at least found in Sections 3274, 3275 and 3277, Revised Codes of

Idaho as amended by Session Laws 1909. (pp. 327-329.) These sections of the statute law of Idaho are printed in full in this brief in the discussion under point II.

II. *The trial court in passing upo nthe motion to dismiss the bill of complaint (Memorandum Decision on Demurrer, Tr. of Record, pp.* 19-24) *quoted and applied as the law of the case, governing the standing of the parties, certain matter which had been the law of the State of Idaho prior to the year* 1909, *but which had been repealed by the Legislature in that year, and which was no part of the law of the State at the time the cause of action arose. The trial court also failed to consider and apply as the law of the case certain new matter which had been enacted in* 1909, *and which made the law of the case as applicable to the parties before the court radically different from what the court evidently supposed it to be.*

In discussing the law applicable to the facts of this case as presented to the trial court on defendant's motion to dismiss the bill of complaint, the said court cited and construed Sections 3274 and 3275, Revised Codes of Idaho.

The writer of this brief was not a member of counsel in the preliminary stages of this case, and so is not informed as to whether or not the law which was in force at the time of the acts complained of was called to the attention of the court, except by copying the same, as was done, in the answer of defendants. The fact is, however, that the trial court con-

strued these sections as they had been originally enacted, not as they were copied in the answer of defendants, entirely overlooking the fact that they had been amended at the 1909 Session of the Legislature and their substance radically changed. In each case, it will be found that the provisions of Sections 3274 and 3275, as quoted and relied upon by the trial court as a basis for his decision, are not contained in these sections, as they existed at the time the court was presumed to be construing them. In order to afford this court a convenient reference to Sections 3274 and 3275, Revised Codes of Idaho, as amended at pages 327-329, Session Laws 1909, we quote the said sections in full.

> Sec. 3274. The Board of Irrigation shall divide the State into water districts in such manner that each public stream and tributaries, or independent source of water supply, shall constitute a water district; *Provided*, That any stream or water supply, when the distance between the extreme points of diversion thereon is more than forty (40) miles, may be divided into two (2) or more water districts; and *Provided*, That any stream tributary to another stream may be constituted into a separate water district when the use of the waters therefrom does not affect or conflict with the rights to the use of the waters of the main stream; and *Provided*, That any stream may be divided into two (2) or more water districts, irrespective of the dis-

tance between the extreme points of diversion, where the use of the waters of such stream by appropriators in one district does not affect or conflict with the use of the waters of such stream by appropriators outside such district; and *Provided*, That this section shall not apply to streams or water supplies whose priorities of appropriation and use have not been adjudicated by the courts having jurisdiction thereof.

Sec. 3275. There shall be held on the first Monday of March of each year, commencing at 2 o'clock p. m., a meeting of all persons owning or having the use of an adjudicated right, in the waters of the stream or water supply comprising such district. Such meeting shall be held at some place within the water district, convenient to a majority of those entitled to vote thereat, which place shall be designated by the water commissioner of the district, and he shall, between January first and February first of each year, file such designation with the county auditor of the county or counties within which such water district is situated and shall notify by mail all persons, companies or corporations known by him to own or claim the use of the waters of such district, and should said water commissioner fail to file such designation by February first, the district judge of the district within which such water district, or portion thereof, is situated, shall, upon application of some interested person, designate the place of holding such meeting,

and in case the first Monday in March has passed, such district judge may also designate the time of holding such meeting.

At such meeting there shall be elected a water master for such water district, and such other regular assistants as such meeting shall deem necessary, and such meeting shall, prior to the election of such water master and assistants, fix the compensation to be paid them, such compensation not to exceed four dollars ($4.00) per day, during the time actually engaged in the performance of their duties. At such meeting each person present owning or having the use for the ensuing irrigation season of any adjudicated right equal to ten (10) inches of water in the stream or water supply comprising such water district shall be entitled to one (1) vote. Such meeting shall choose a chairman and secretary and shall determine the manner and method of electing water masters and assistants. Within five (5) days after such meeting the chairman and secretary shall forward a certified copy of the minutes of such meeting to the Water Commissioner of the district; *Provided*, That a corporation shall be considered a person for the purpose of this section and shall cast its vote by some one to be designated by the corporation; and *Provided*, That each stockholder in said corporation shall be entitled to as many votes as he shall have units of ten miners' inches of water, regularly adjudicated, in the stream or wa-

ter supply comprising such water district; and *Provided*, That should said meeting not be held or not choose a water master, or not fix the compensation thereof, then the Water Commissioner of the district may appoint such water master, and fix his compensation, not exceeding four dollars ($4.00) per day.

The Water Commissioner may, at any time, remove any water master within his division for failure to perform his duty as such water master, upon complaint in that respect being made to him in writing by any person owning or having the right to the use of an adjudicated right in such district, and the Water Commissioner may appoint a successor for the unexpired term.

Before entering upon the duties of his office, said water master shall take and subscribe an oath before some officer authorized by the laws of the State to administer oaths, to faithfully perform the duties of his office, and shall file with the Clerk of the District Court in the county in which said water master resides, said oath and his official bond in the penal sum of five hundred dollars ($500.00), with not less than two (2) sureties, to be approved by the judge of the probate court of the county in which he resides, and conditioned for the faithful discharge of the duties of his office.

We also print in full in an appendix to this brief, Sections 3274 and 3275, Revised Codes of Idaho, as they were originally enacted,

and as they were construed by the trial court, the parts quoted by the court appearing in italics. A simple comparison will show that the trial court did not have before him the law of the case when preparing his memorandum decision upon defendant's motion to dismiss the bill of complaint.

It will be observed that by the third paragraph of Sec. 3275, Revised Codes of Idaho, the Water Commissioner is given general jurisdiction over the water masters within his division through authority to require of them the performance of their duties and to remove any of them for failure in this respect. The Water Commissioner is also given authority to appoint a successor for the unexpired term of any water master so removed. The duties of the water master, as quoted by the trial court from Sec. 3275, as originally enacted, are not found in Sec. 3275, as amended and as set forth above. The duties of the water master are now found in Sec. 3277, Revised Codes, as amended at page 329, Session Laws 1909, and for the convenience of the Court, we also set out the said section here in full:

> Sec. 3277. It shall be the duty of said water master to distribute the waters of the public stream, streams, or water supply, comprising his water district, among the several ditches taking water therefrom according to the prior rights of each respectively, in whole or in part, and to shut and fasten or cause to be shut and fastened, under the direction of the Water Commissioner of his district, the headgates of ditches heading

from such stream, streams or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply; *Provided*, That any person or corporation claiming the right to the use of the waters of the stream or water supply comprising a water district, but not owning or having the use of an adjudicated right therein, shall, for the purpose of distribution, during the scarcity of water, be held to have a right subsequent to the adjudicated rights in such stream or water supply, and the water master shall close all headgates of ditches having no adjudicated right if necessary to supply adjudicated rights in such stream or water supply.

The above section as originally enacted is also printed in full in the appendix.

The conclusion is inevitable that Sec. 3274, as above set out, must be held to have full application to the Boise River since, to say the least, the waters of this river have been adjudicated as to priority of appropriation and use. This being true, it follows that, under Sec. 3277, as it now exists, and as it existed at the time of the commission of the acts complained of, the defendant water master, E. F. Lakin, under the direction of the defendant water commissioner, Elias Marsters, had direct authority of law for their acts which have been made the subject of complaint in this case.

It is entirely clear from the pleadings in this case, and it will not be denied by counsel for plaintiff, that

the United States has no decreed or adjudicated right in the waters of Boise River. It is true that it has a permit from the State Engineer to divert a certain quantity of the waters of Boise River, but this permit represents nothing more than the right to receive and use that amount of water after all prior appropriators have received the amounts to which they are entitled. In other words, the permit represents merely a right to stand in the water line and to receive water to a given amount should any be left for them when they are reached. (Neilson vs. Parker, 19 Idaho 727, 115 Pac. 488; Speer vs. Stephenson, 16 Idaho 707, 102 Pac. 365; Lockwood vs. Freeman, 15 Ida. 395, 98 Pac. 295. Its position in this case is clearly covered by the provisions of Sec. 3277, Revised Codes of Idaho, as amended by Session Laws 1909, and as set out above, wherein it is specified:

> "That any person or corporation claiming the right to the use of the waters of a stream or water supply comprising a water district, but not owning or having the use of an adjudicated right therein shall, for the purpose of distribution during the scarcity of water, he held to have a right subsequent to the adjudicated rights in such stream or water supply, and the water master shall close all headgates or ditches having no adjudicated right, if necessary to supply adjudicated rights in such stream or water supply."

Under this provision of the statute, the water master and the water commissioner not only had authority, but it was their duty to close the headgates of

the United States, since, admittedly, it has no adjudicated right, if in their judgment, they found it necessary to do so in order properly to supply the adjudicated rights in such stream. To hold, therefore, that they had no right to do so is wholly to ignore the statute.

It will be observed that in holding that the complaint stated a cause of action the trial court was led to the conclusion that defendants had acted beyond and without the law, that they were *prima facia* trespassers upon the rights and property of plaintiff, and that the action for damages would lie, through a total misconception of what the law really was. There is absolutely no reason to believe that if he had read the law as it then existed, if he had read Sections 3274, 3275 and 3277, Revised Codes of Idaho, as they had been amended and as printed above, instead of as originally enacted, he would have held as he did, that no presumption arises that the defendants "were acting within the scope of their official authority, or were in the rightful exercise of their official discretion." On the contrary, the statute confers explicit authority to do exactly what was done. There is, therefore, not only a presumption, but a positive assurance that they were acting within the scope of their official authority and discretion, and it follows that they are not liable in damages for carrying into effect the mandate of the law which they were appointed to enforce.

We confidently look to this court to correct the injustice unfortunately done to defendants, as we

believe, through a misconception on the part of the trial court, of the law under which they were acting.

III. *If it be true that at the time the cause of action in this case arose, there was no valid and subsisting decree of the waters of the Boise River, then the trial court would be under the practical necessity of making findings equivalent to the entry of such a decree, before the right of plaintiff to the use of the water of which it claims to have been unjustly deprived could be established. The District Court of the 7th Judicial District of the State of Idaho having before it the question of the ascertainment of the duty of water on the Boise River and the application thereof to the priorities as established, the trial court in this case should have refused jurisdiction of any matter which either directly or indirectly involved the rights of prior appropriators.*

The gravamen of the complaint in this case is the alleged deprivation by the defendants of the use of certain water to which it is alleged the plaintiff was entitled. It is a peculiar fact, but none the less true, that neither the original bill of complaint, nor the supplemental bill of complaint contains an allegation that the water which the plaintiff was using on the day when it alleges its rights were interfered with by defendants was being properly used by it, or properly diverted from the main channel of the Boise River. The case, however, must be regarded, we take it, as having proceeded upon the assumption, if not upon the allegation that plaintiffs were entitled to the water which they were diverting on the day in

question, and that the action of defendant in depriving them of a certain quantity of that water was in effect depriving them of property whose money value could be actually determined and compensated for in damages.

In order, however, that the court might be justified in awarding damages, there must be something more than an assumption that plaintiffs had a right to the quantity of water which they were diverting. If it should happen that they were merely trespassers upon the stream in question and diverting water without authority of law, there would be no warrant for awarding damages, since the law could not hold them injured by being deprived of that to which they had no just title, and certainly when so deprived by officers acting within the scope of their official authority and discretion. It clearly follows, we take it, that in order to establish a right to damages, the plaintiff, in the court below, must have first established its right to the water of which it claims to have been unlawfully deprived. It could not establish that right merely by showing that it was diverting a given quantity of water, since it would only have a right to divert water in any quantity after all prior appropriators were supplied with the amounts to which they were entitled. If, as held by the trial court in this case, there was no decree of the waters of the Boise River "effective for any purpose," it must follow in practical effect that such decree must be made by the court in order to determine whether or not the plaintiff was being deprived

of a right. For how could the court say that the plaintiff was deprived of water the use of which it could justly claim, without first determining the amount which all prior appropriators, from the same course, were entitled to receive on the day in question and then determining the amounts with which they were actually supplied. Brown vs. Smith, 10 Cal. 508. If all prior appropriators were receiving the full amount of their rights, and if there was enough water left in the Boise River to supply the right claimed by plaintiff, or to supply the amount which it was actually diverting on the day in question, there would be a basis established for awarding damages, but until that basis was established, the very foundation for the awarding of damages would be lacking.

As hereinbefore set out, the District Court of the 7th Judicial District of the State of Idaho, had decreed the waters of the Boise River, and under the decision of the Supreme Court, jurisdiction had been retained in the said district court to hear further evidence touching the proper duty of the waters of the Boise River upon bench and bottom lands supplied by it. The determination of any question affecting the rights of prior appropriators to the use of the waters of the Boise River at any given time could not properly be made without making all prior appropriators parties to the action. See McLean, Water Commissioner, et al., vs. Farmers' Highline Canal & Reservoir Co. et al., 44 Colo. 184, 98 Pac. 16. The question of fixing the duty of water and the determination of the amount to which all prior appropri-

ators were entitled was then pending before the District Court of the 7th Judicial District of the State of Idaho, and all the necessary parties were before the court. Under the rules which govern in cases of this character, the Federal District Court for the District of Idaho should have refused jurisdiction of this case since it necessarily involves as between the plaintiff and prior appropriators, before plaintiff's right could be established, a determination of the amount of water to which prior appropriators were entitled and the amount they were actually receiving at the moment of the alleged injury.

Where a state and federal court have concurrent jurisdiction, that court which first acquires jurisdiction will retain it to the end.

Sharon vs. Terry, 36 Fed. 337, 1 L. R. A. 572.

Parks vs. Wilcox, 6 Colo. 489.

Where two suits involving to a great extent the same subject matter, are brought in a state and federal court, that court whose process is first served obtains jurisdiction of all questions which legitimately flow out of the subject matter of the case.

Union etc. Co. vs. University of Chicago, 6 Fed. 443.

Parkes vs. Aldridge, 8 Fed. 220.

In re James, 18 Fed. 853

Bruce et al. vs. Manchester, et al., 19 Fed. 342.

Ball vs. Thompkins, 41 Fed. 486.

City of Opelika vs. Daniel, 59 Ala. 211.

See also:

American Association Ltd. vs. Hurst, 59 Fed. 1, 7 C. C. A. 598.

Hall et al. vs. Ames et al., 190 Fed. 138.

American Ship Building Co. vs. Whitney et al., 190 Fed. 109.

IV. *Before the plaintiff is entitled to damages for loss of the use of water for irrigation purposes, it must clearly establish its right to such use. Such right can only be established by showing that after all prior appropriators had been supplied with the water to which they were entitled, there was still sufficient water in the source of supply to furnish plaintiff with the quantity which is was diverting at the time in question and of which it claims to have been unlawfully deprived.*

We have heretofore invited the attention of the court to the fact that there is found no allegation whatever in either the bill of complaint or the supplemental bill of complaint to the effect that plaintiff was rightfully entitled to the water which on the 11th day of July, 1913, it was diverting from the main channel of the Boise River.

> "The material allegations in a complaint in an action for damages for injuries to water rights, ditches, or canals, or other works, lands, growing crops, or personal property, do not differ materially from the allegations of a complaint for damages caused from other injuries. The plaintiff should allege his ownership or right of possession

of the property in question." Kinney on Irrigation and Water Rights, Sec. 1686.

"The allegation of an approved permit from the State Engineer to divert a certain amount of water is not an allegation of any right whatever as against prior appropriators."

Lockwood vs. Freeman, 15 Ida. 395, 98 Pac. 295.

Neilson vs. Parker, 19 Ida. 727, 115 Pac. 488.

Speer vs. Stephenson, 16 Ida. 707; 102 Pac. 365.

In view of these considerations, we are entirely convinced that the bill of complaint wholly failed to state a cause of action, and is insufficient to sustain the judgment.

Regardless of the fact, however, that the right to this water was not alleged, we assume that damage cannot be predicated upon the loss of water unless the right to its use be first established by competent evidence. This is, we think a general rule which runs through the entire body of the law of damages.

"To entitle a person to damages, there must be an injury which is a violation of a right."

Parker vs. Griswold, 17 Conn. 288, 42 Am. Dec. 739.

"In order to be entitled to damages for the injury to a water right or to a ditch, canal or other works connected therewith, the person suing

must be the owner of the title to such rights, or must have been entitled to their use.

Kinney on Irrigation and Water Rights, Sec. 1661.

Cash vs. Thornton, 3 Colo. App. 475, 34 Pac. 268.

If the plaintiff on the day in question was a mere trespasser upon the Boise River; if it was diverting water to the use of which it had no right, it would have no standing whatever for coming into court and asking damages for the deprivation of such water to which it was not entitled, but to which the prior appropriators on the river had a just and valid claim.

It will be noticed that this entire case, insofar as plaintiff is concerned, seems to be based upon the theory that it can collect damages for being deprived of the water which it was then diverting, regardless of whether it had the legal right to divert the said water or not.

As heretofore pointed out, the plaintiff has attempted to reject the Stewart decree (Plaintiff's Exhibit "G") as wholly ineffective for any purpose. Let us assume for the moment that this theory may be accepted as correct, and that it can be truthfully asserted that there was at the time in question no valid adjudication of the waters of the Boise River. Let us assume, moreover, that all rights on the river were being exercised under the rule in force in Idaho that such rights may be acquired by actual appropriation and actual application to a beneficial use. Even under this theory, the fact cannot be questioned that

there were 134 appropriators whose rights were prior in time to the right of plaintiff, (some of these being corporations supplying scores of individual users), and that before plaintiff could establish its right to damages, the burden was upon it to show affirmatively that, after all prior rights had been supplied with the water to which they were entitled by virtue of appropriation and use, there was still left in the river the amount of water which plaintiff was actually diverting at the time in question, and for the loss of a part of which it now seeks to be compensated in damages.

Following this line of argument, it became necessary for the plaintiff to show and for the court to determine the amount of water to which each prior appropriator had acquired the right of use, and if the Stewart decree (plaintiff's Exhibit "G") is to be wholly rejected insofar as its findings as to the duty of water are concerned, it was first necessary for the plaintiff to show by competent evidence the proper duty of water and for the court to make a proper finding in this matter before the quantity to which prior appropriators were entitled could be determined, even approximately.

We have heretofore contended,—and we firmly believe, that we have shown the essential correctness of this contention,—that there was at the time of the alleged acts of injury a valid and subsisting decree of the waters of the Boise River. The total amount of water awarded by this decree to those rights prior in time to that of the plaintiff was 2755 second feet.

If this decree was a valid and subsisting decree on July 11th, 1913, we submit that at the very beginning of this case, and as an essential prerequisite to the establishment of the right to damages in any amount, it was necessary for the plaintiff to show that after all prior appropriators had been supplied with 2755 second feet of water from the Boise River, there still remained in the river the amount which plaintiff was actually diverting on the day in question; or if, as indicated above, plaintiff's contention should be upheld—that prior appropriators were not entitled to the 2755 second feet of water awarded them by the Stewart decree (Plaintiff's Exhibit "G"), the burden was then on plaintiff, as an essential prerequisite to the establishment of its right to damages in any amount, to establish, first, the proper duty of water on the lands supplied from the Boise River, second, the number and amount of all prior appropriations, and, finally to show that, after prior appropriators had been supplied with this amount, there still remained in the river for its use the water which it was diverting on the day in question.

An examination of the record will show, however, that plaintiff has made absolutely no proper effort to establish by competent evidence the duty of water from the Boise River, and has allowed this question to go wholly by default, or practically so. To say the least, there is an utter lack of evidence in the record upon which the trial court, this court or any other would be justified in attempting to fix the duty of water from the streams in question. This being true,

it follows that the duty of water as fixed by the Stewart decree (plaintiff's Exhibit "G") must, for the purposes of this case, be accepted as the only criterion by which we may arrive at a determination of the question as to whether, on the date of the alleged injury, there was any water flowing in the Boise River which plaintiff could properly claim the right to divert.

Before proceeding with a discussion of the evidence which was actually presented by plaintiff by way of substantiation of its claim, we desire to quote from the decision of the Appellate Court of Colorado on the question of the necessity of establishing the right, which is claimed to have been violated, at the very threshhold of establishing the right to damages.

> "The right to the use of water for irrigation purposes is a right of property, the subject of ownership like any other property. Although the manner of acquiring the right of property in the use of water is peculiar, and different from that of other property, such right to use must be determined, like any other property right, upon the ownership. It does not appear that there had been any formal adjudication or decree defining the rights of the parties to the water in controversy. It is declared in the State constitution (Art. 16, Sec. 6) that 'priority of appropriation shall give the better right as between those using the water for the same purpose.' The Supreme Court of this State, in Thomas vs. Guirand, 6

> Colo. 532, declared 'a true test of the appropriation of water is the successful application thereof to the beneficial use designed,' which decision has been since followed. * * * A judgment for damages for the diversion of water could only be based upon the ownership or right of property in the water and the wrongful invasion of that right."
>
> Cash vs. Thornton, 3 Colo. App. 475; 34 Pac. 268.

The principle enunciated in the foregoing case cannot, we think, be successfully questioned. The right to damages must be based upon the ownership or right of property in the water, and if the plaintiff has not established a right of ownership or right of property in the water being diverted on the date in question, it has established no right to damages whatever.

The record may be searched in vain for any light upon the question of how plaintiff established its right, even in its own mind, to the water of which it claimed to have been deprived. Not a single witness introduced by the plaintiff offered evidence showing, or tending to show, the process by which the plaintiff made allowance, if it did make any, for the prior rights on the river and arrived at the amount which it claimed the right to divert. Its headgates were the highest upon the stream. It had the first chance at the diversion of water. It refused to recognize the authority of the Water Commissioner or of the water master to regulate the amount of water it was entitled to receive. It turn-

ed out such water as it wanted and locked its gates at the desired point so as to prevent interference from any source whatever. It clearly presumed to be a law not only to itself but to all others on the river, since it was in position to take what water it wanted for itself and to send the balance down to the prior appropriators. It is impossible to determine from the record the rule that was followed by the plaintiff in determining how much water it would allow the prior appropriators to receive. It rejected the Stewart decree, (Plaintiff's Exhibit "G") and so clearly it did not allow the older appropriators the amounts carried by such decree. If it did not, did the agents of plaintiff have the authority to determine for themselves and for all other appropriators what the proper duty of water should be? And if they had such authority from whence was it derived? The laws of the State of Idaho and the laws of Congress may be searched in vain for any statute which confers such extraordinary authority. If as held by the trial court the status of the plaintiff on the river is exactly that of any other appropriator, are we not confronted in this proceeding with one appropriator, and a junior one at that, from his point of vantage on the river, assuming to fix for himself and for all prior appropriators the proper duty of water and to regulate its use accordingly; and all this without the authority of any court procedure whatever, and in disregard if not defiance of the administrative officers appointed by the State of Idaho to regulate the distribution of water to those who

have an established right to its use. But here let us examine somewhat the testimony offered.

Mr. George H. Bliss was the project manager of plaintiff's Boise project, and his testimony as to the basis of plaintiff's claim, at the time of the alleged injury, is at least edifying. After testifying that on July 11th, 1913, he was diverting 980.4 second feet from the Boise River, he testified as follows:

> We intended to continue taking that amount until the order of the court. We did not base this amount on anything. We just assumed there was no order of the court, that the Stewart decree stood as to priorities simply, and did not carry any amount, and that until there was an order of the court the Stewart decree was void as to amounts. 980.4 second feet delivered at the New York Canal what they required for their lands, and gave us what we required for our lands without any surplus running into the reservoir. That is, that was enough. When we had that we had what we required.
>
> Q. In other words, you took what you required regardless of whether the prior appropriators had what they required or not?
>
> A. We took this amount. That is what we required to properly irrigate our lands on the project, on the proposition that there was no order of the court in effect.
>
> Q. And until there was an order you assumed you had a right to whatever you required for your lands?

A. Yes.

Q. Suppose, Mr. Bliss, that there were only 980.4 second feet in the river at that particular time, do you suppose you could take it all because you needed it all?

A. I do not know what we would have done, of course, under that circumstance, but I was acting under the advice of my counsel in taking this amount of water. (Tr. p. 100).

Again testifying with reference to the basis upon which damage was asserted, Project Manager Bliss testified as follows:

Q. If there was 1710 second feet in the river on July 18th when this order went into effect, and prior rights were entitled to 1619 feet, then upon that basis you certainly were not entitled to 980.4 second feet were you?

A. Not on that basis.

Q. What right have you to say you were damaged in the sum of $387.20, or any other amount, unless you also state the basis upon which you make that calculation?

A. I made my calculations upon three bases: One is that Mr. Marsters did not have any right at any time on government property, and another was that up to the time he didn't have any right, up to the time of the temporary order or decree, but did have after July 18th.

Q. But in making this calculation, isn't it true that you assumed throughout that you were en-

titled to have the amount of water you were taking on July 11th?

A. That on the assumption that he hadn't any right to take it out at all at any time. (Tr. p. 104.)

Q. Now then, in view of all that, Mr. Bliss, I would like you to tell me just as simply as possible how you arrived at the amount of water which the United States was entitled to use on the 11th day of July, 1913.

A. We assumed that we was entitled to everything, without an order of the court, that is up to a certain amount, that was agreed upon between these attorneys. I think they told me—in discussion with Mr. Stoutemyer—as to what we should keep and what we should let go. (Tr. pp. 98-99.)

From these quotations from the testimony of the principal witness for plaintiff, as well as from the entire body of plaintiff's testimony, as shown by the record, it will be observed that there was a very noticeable lack of candor on the part of the witnesses as to the basis of plaintiff's right which is claimed to have been injured. Mr. Bliss testified that, regardless of prior appropriators, the plaintiff was diverting on July 11th, 1913, the amount of water which it needed to irrigate the lands under its system; that plaintiff's claim for damages was predicated upon a right to divert this amount of water during the entire irrigation season of 1913; and that the Water Commissioner or the water master acting under him, had no authority to regulate in any manner plain-

tiff's headgates and thus fix the quantity of water which it was allowed to divert. And this is the most which could be abstracted from those who testified and who were supposed to be in position to know. The United States although, under the law, regarded as any other appropriator upon the river, having no greater and no lesser rights, was actually represented on this project by agents who assumed the right to take from the river, without let or hindrance all the water it needed, without regard to prior appropriators and without recognition on the part of those officers created by statute for the common protection of the rights of all water users, of any authority to go upon its property or to regulate in any manner its diversion of water from the river.

We insert here a tabulation compiled from the evidence given by the witnesses introduced by plaintiff.

	1	2	3	4	5	6	7	8
	11	2420	261	2159	2755	219	2536	377
	12	2200	312	1888	2755	249	2506	618
	13	2100	344	1756	2755	323	2432	676
	14	1990	435	1555	2755	452	2303	748
	15	1890	464	1426	2755	473	2282	856
	16	1800	478	1322	2755	473	2282	960
	17	1710	487	1233	2755	473	2282	1049
	18	1710	436	1274	2755	473	2282	1008

In the above table:

Column 1 gives the dates from July 11th to 18th, inclusive.

Column 2 gives the measured flow of the Boise River at the Highland Station. This data is taken from Plaintiff's Exhibit "B".

Column 3 gives the measured amounts of water flowing in the government canal on the dates in question. This data is taken from the testimony of plaintiff's witness George H. Bliss. (Tr. p. 89.)

Column 4 is derived from subtracting the amounts in column 3 from the corresponding amounts in column 2, and represents the amounts which on the dates considered were taken down the river for the purpose of supplying prior rights.

Column 5 gives the amounts to which appropriators prior in time to the plaintiff were entitled. This data is taken from the next to the last page of Plaintiff's Exhibit "G".

Column 6 represents the amount of all rights prior to that of the plaintiff which, on the days in question, were being supplied through the government canal. These figures include both the New York Canal rights and the transferred rights and the data is taken from the testimony of plaintiff's witness Project Manager George H. Bliss.

Column 7 is derived from subtracting the amounts in column 6 from the corresponding amounts in column 5 and represents the amounts of water in second feet which on the days in question were necessary to supply rights prior in time to that of the plaintiff.

Column 8 is derived from subtracting the amounts in column 4 from the corresponding amounts in column 7. These figures represent the amounts in second feet which the water passing the plaintiff's

headgates lacked of being enough to supply the prior rights lower down the river.

It will be observed that the average of the amounts in column 8 is 786 and this figure gives us the average shortage in second feet to supply prior rights of the water being taken past the government canal. These figures, it must be remembered, are taken from the evidence of plaintiff's own witnesses. There is, however, the element of return flow and tributary gains to be considered, since it is admitted that these are available for the supply of prior rights. No one knows just what amount of water was available from these sources in July of 1913. Mr. Stewart, the hydrographic engineer, who testified for plaintiff stated (See Tr. p. 132.) that the average return flow of the entire river for July, 1914, was 551 second feet. If we take that as the return flow for the period of shortage of July, 1913, and this would be exceedingly liberal to plaintiff, its own evidence shows that there was still an average shortage in the amount needed to supply prior rights of the difference between 786 and 551 or 225 second feet.

In other words, plaintiff has shown by its own evidence not only that it was deprived of no right in the period between July 11th and 18th, inclusive, but that during this period the prior appropriators were actually short an average of 225 second feet of the amounts to which they were entitled.

We make no discussion of the days on which the defendants controlled plaintiff's

headgates after July 18th, for the reason that on this date the court having jurisdiction of the question of the rights on the river made its temporary order or decree for the season of 1913. Even under the mistaken view of the law which led the trial court to hold that defendants had no right to regulate plaintiff's headgates prior to July 18th, there can be no contention that he had no such right after that date or that he could be held liable in damages for an honest performance of his duties under the decree of the court. As to the period between July 25th and August 10th, it is admitted that there was plenty of water for all because of rains which raised the river (See Tr. p. 91.) and as to the period after August 10, or rather after July 31st, there was no evidence offered as to the amount of water actually received by the plaintiff.

In addition to the showing made by the data compiled above, taken from the testimony and exhibits of plaintiff, we desire to invite the particular attention of this court to certain other testimony offered by one of the witnesses for plaintiff. This testimony shows conclusively and affirmatively that on the 11th day of July, 1913, when defendants first raised plaintiff's headgates, the prior appropriators on the river were not receiving through their canals the amounts of their decreed rights.

Mr. Stewart, who qualified as expert hydrographic engineer, testified that on July 11, 1913, he measured practically all of the canals on the Boise River, taking out water below the government diver-

sion dam for the purpose of determining the exact amount of water which on that date they were diverting from the river. He mentions a few cases in his direct testimony where he claimed the canals were diverting more than their decreed rights. On cross examination he admitted that there were many canals which according to his measurements were diverting less than their decreed rights. At pages 133-4 of the Transcript, the following significant testimony is found:

> "I didn't say anything about the canals drawing much less than their right under the Stewart decree. The aggregate of the discharge in the canals measured was 1639 second feet, and the aggregate of the Stewart decree for these rights was 2133, or 77 per cent. of the Stewart decree. Including the old New York right, there were 403 second feet of the small canals that I didn't measure. I don't know whether they had all the water they were entitled to or not. The statement shows a difference of between 1639 and 2133 second feet which these canals were taking less than their decreed rights under the Stewart decree."

Mr. Stewart testified that he measured all the canals on the Boise River with the exception of some few of the smaller canals whose rights aggregated 403 second feet. These canals were measured at the point of intake from the river. The measurement, therefore, included all the water taken from the river by such canals and must of necessity have included

such water as was allowed to pass down the river below the government diversion dam, together with all accretions below that point whether from return flow or tributary gains. The testimony of Mr. Stewart shows, therefore, that on the 11th day of July, 1913, the appropriators prior in time to the plaintiff were actually diverting from the Boise River 496 second feet of water less than the amount to which they were entitled, even allowing them only 77 per cent. of the Stewart decree. If this calculation and measurement had been made on the basis of the full rights under the Stewart decree, it will be seen that the shortage would have been 644 second feet. Considering in this connection the canals which were not measured by Mr. Stewart, and the fact that the water in the river decreased rapidly in the days between July 11th and July 18th, as shown by Plaintiff's Exhibit "B", it must be admitted that we have a result which very closely corresponds with and corroborates that deduced from the compilation above, wherein it was shown that the average shortage to prior rights during this period was 786 second feet.

It follows, without further argument that plaintiff has not established a right, neither has he shown a violation of a right and any award of damages based upon such evidence is clearly erroneous and unjust.

V. *Before the plaintiff is entitled to damages for loss of the use of water for power development, it must clearly establish that the act complained of*

has resulted in an actual loss of power. If it should appear that by reason of the act complained of more power has actually been developed than would have been the case if the act had not been committed, the plaintiff has entirely failed to establish any ground whatever for the award of damages.

The record shows that the plaintiff has a power plant near the point of its diversion dam upon the Boise River, and that it uses the water flowing in the natural channel of the Boise River for the development of electric power. The record further shows that about a mile below the point of diversion, the plaintiff has certain waste gates, which, when open, permit the water from its canal to flow back into the Boise River. It was shown in the evidence that after defendants had assumed control of the headgates of plaintiff, they measured the amount of water which was allowed to pass the waste gates, at or near the said waste gates, and that during the time they were in control of the system, a certain amount of water was regularly allowed to waste back into the river through these gates. There is some evidence in the record showing that this waste was in part unavoidable, owing to the fact that the waste gates could not be tightly closed and all the water running through them shut off. (Tr. p. 124.) The agents of the plaintiff appear to have kept a record of the amount of water thus wasted back into the river from August 11th, 1913, to October 3rd, 1913, and to have made certain calculations showing the increased power which might have been developed with this water

which wasted through the gates had it been allowed to run through the wheels of the power plant near the diversion dam.

It is clear, however, that the acts of the defendants must be regarded in their entirety, and before a judgment for damages can be legally awarded because of loss of water for power purposes, it must be shown affirmatively that the act of defendants deprived plaintiff of water, which, without that act, would have been used for power development.

Mr. Bliss, the project manager, testified that by the act of defendants on July 11th, 1913, 719.2 second feet of water, which, prior to the lowering of plaintiff's headgates had been flowing in its canal, were sent on down the river and thus passed through plaintiff's power plant. (Tr. p. 87.) The witness, as hereinbefore quoted in this brief, claimed to be diverting on July 11th, the amount of water which the lands under the project then needed, and the inference is entirely clear, even though not fully established by the record, that the project manager would have continued to divert the same amount of water throughout the season. The estimate of the damage caused by the defendants' acts was based upon the supposition that the plaintiff would have been entitled to continue using, throughout the irrigation season of 1913, the amount being diverted on July 11th, 1913.

There were fifty-four days intervening between August 11th and October 3d, 1913, including both of these dates. If the act of defendants caused 719.2

second feet of water to be available for power development purposes, over and above that which would have been available had the act complained of not been committed, and the plaintiff be supposed to have been given the use of that same amount of water for each of the fifty-four days in question, it follows that during the entire period over which the computation made by plaintiff was based, the plaintiff was, by the acts of defendants, given 38,836.8 second feet of water for power development more than it would have received had not the action in question been taken.

The computation made by plaintiff's agent (see Plaintiff's Exhibit "H",) shows that all the water measured at the waste gates, and of the use of which they claim to have been deprived for power purposes, was 3552 twenty-four-hour second feet. Deducting this latter amount of 3552 twenty-four-hour second feet, of which plaintiff claims to have been deprived, from 38,836.8 twenty-four-hour second feet, which, as shown above, was made available for power development purposes by the acts of defendants, and it will be seen that the act of defendants resulted in giving to plaintiff 35,284.8 twenty-four-hour second feet of water for power purposes more than, by its own admission, it would have had if it had been allowed to continue diverting for purposes of irrigation the amount of water which it was taking on July 11th, 1913.

If it be true, as testified by witnesses for plaintiff, that 3552 twenty-four-hour second feet additional

water would have resulted in the development of power which might have been sold for the sum of $259.22 (See Tr. p. 108), it must also be true that the additional use of 35,284.8 twenty-four-hour second feet of water must have resulted in the development of power for which it undoubtedly received the sum of $2,574.98. It thus appears that the acts of defendants, insofar as the development of power is concerned, must be regarded as a gain to the plaintiff of $2,574.98, rather than a loss of $259.22.

It appears to us that it would be clearly erroneous, in any view of the case, to charge the defendants with the loss of power which resulted from their acts, without at the same time crediting them with the gain of power which resulted from the same acts. When this has been done, the plaintiff is clearly seen to have been enabled to manufacture more power as a result of defendant's acts of interference with its system than would otherwise have been the case, and it would be contrary to all principle to award damages upon such a showing.

If plaintiff's agents had been willing to recognize the authority of defendants, under the statutes of the State of Idaho, to regulate the use and distribution of the waters of the Boise River, if they had been willing to co-operate with them in securing the proper adjustment of their gates at the point of diversion, if they had been willing to occupy, as they must do, the same status as other appropriators on the river, instead of attempting to be a law unto

themselves and all prior appropriators, none of these troubles need have occurred and no claim need have arisen for loss of water for power development or for any other purpose.

VI. *Where plaintiff diverts water for sale or rental, the amount of money received depending upon the measured quantity of water actually delivered, it must, before it can establish a right to damages for the loss of a part of its water, show by competent evidence that the water would have been actually sold if not interfered with and the purchase or rental value realized.*

In this connection, we desire only to invite the attention of this court to the fact that there is absolutely no testimony in the record to the effect that plaintiff could have sold for irrigation purposes the water of which it claims to have been deprived, even though it had been allowed to divert the same through its canals. George H. Bliss, the project manager, gave it as his belief that the water could have been sold, but there is no showing that any single settler was under contractual obligations to take any part of this water, or that any single settler would have purchased more than the amount he actually did receive, even though plaintiff had been allowed to divert the additional water into its system.

The plaintiff is conducting an irrigation system under which it sells water at a given price per acre foot, and until it produces evidence to show that the water claimed by it could have been sold to actual users who would have paid therefor, the plaintiff

has wholly failed to establish a basis of damages for deprivation of such water.

VII. *In an action for damages resulting from the loss of water damages can not be awarded upon evidence which is wholly insufficient and inconclusive to establish the right claimed to have been violated or the amount of the loss.*

From a careful inspection of the record, we believe it will appear to the court that no sufficient evidence is to be found in the record to establish even an approximation of the actual loss to plaintiff, even though it should be conceded that some loss was actually sustained.

Where damage has been sustained, its amount must be computed according to reasonable rules. It cannot be arrived at by any haphazard method, or by a process of approximation which amounts to guess work pure and simple. Until the extent of the right of plaintiff to the use of water on the days in question has been established, we contend that any attempt to determine the value of this right, which it claims to have been violated, could amount to nothing more, or better, than a worthless guess. As heretofore pointed out, there is absolutely no evidence in the record of this case which shows, or which tends to show, the extent of plaintiff's right, and to attempt, therefore, to fix its damage at a definite amount is clearly violative of all the rules of the law of damages.

It is conceded that there are classes of cases in which the amount of the loss or injury cannot be de-

termined with exactness, and that in such cases the court or jury is allowed to fix the measure of damages as nearly as is possible consistent with justice; but even in all such cases, the principle that the right, claimed to have been violated, must first be established still obtains, and until that right has been established no sum can be assessed as compensatory damages under any theory whatever.

It seems to us, therefore, that even though the trial court, as we have shown, from a mistaken reading of the law which was in force and effect at the time of the commission of the acts complained of, believed, as he evidently did believe, that defendants had no right or authority to interfere with the headgates of plaintiff and regulate the amount of water which it was diverting, its damages were nominal only, and could properly have been made nothing more than nominal under the evidence adduced.

> "The amount of loss is as much to be proved by the plaintiff as the fact of loss. Consequently where the injury is proved but there is no evidence as to the amount of the loss, the plaintiff is entitled to nominal damages only."
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> Murray vs. Pannaci, 130 Fed. 529.
>
> Seabord Mfg. Co. vs. Woodson; 98 Ala. 378, 11 So. 733.
>
> Eldridge et al. vs. Gorham, 77 Conn. 699; 60 Atl. 643.
>
> Pennington vs. Lewis, 4 Pennew. (Del.) 447; 56 Atl. 378.

Richmond Hosiery Mills vs. West. Union Co., 123 Ga. 216; 51 S. E. 290.

Freeze vs. Crary, 29 Ind. 524.

Roberts vs. Minneapolis Treshing M. Co., 8 S. D. 579; 67 N. W. 607.

Hudson vs. Archer, 9 S. D. 240; 68 N. W. 541.

Williams vs. Brown, 76 Ia. 643; 41 N. W. 377.

The defendants in this case are poor men. At the time of their alleged injury to the plaintiff they were the duly appointed and acting officers of the State of Idaho for the distribution of the waters of the Boise River to those entitled to its use. Their duty could be performed only through the exercise of judgment and discretion. There is absolutely no evidence that they acted from any but the most proper official motives; much less is there any evidence that they acted in any manner from malice or a desire to injure the plaintiff in its rights. It does appear from the record that they acted throughout under the advice and instruction of the Attorney General of the State of Idaho, who construed Section 3277, Revised Codes of Idaho, heretofore quoted in full in this brief, as authorizing defendants to take the identical action which was taken by them. Every intendment of the law should, therefore, be in their favor, and, we submit, they should be held liable in compensatory damages only when it has been clearly shown that they acted wholly without and beyond the scope of the law or with malice toward the plaintiff. When the actual provisions of the law are read

and applied to the case, it will be found that they acted within their official authority and discretion and that there is no ground whatever for holding them personally liable to the plaintiff in any amount. But even under the mistaken theory of the law upon which this case proceeded, it seems clear that nothing beyond nominal damages should have been awarded by the trial court. And nothing beyond nominal damages can, we believe be sustained by this court, in view of the character of the evidence produced, even though, as seems most improbable, this court should affirm the findings to the trial court to the extent of holding that a proper basis for damages in some amount has been established.

The view of the law adopted by the trial court was erroneous, as has been clearly shown, and all the proceedings, the findings and decree based upon this view of the law were equally erroneous and indefensible. Upon this presentation of the matters involved we submit our case to this court in the confident expectation that the correct interpretation of the law will be declared, and the manifest injustice done to the defendants (Appellants here) be corrected.

Respectfully submitted,

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APPENDIX.

(We print here Sections 3274, 3275 and 3277, Revised Codes of Idaho as they were originally enacted and as they were quoted from by the trial court by way of establishing his view of the law applicable to the case. The parts quoted by the court and which were omitted from these sections as they were re-enacted in 1909 are here printed in italics, in order to afford easy verification of our claim that what the court quoted and cited as the law was not the law at that time. These sections as they existed at the time are quoted in full in this brief.)

Sec. 3274. The Board of Irrigation shall divide the State into water districts, said water districts to be so constituted as to secure the best protection to the claimants for water, and the most economical supervision on the part of the State. *The water districts which shall be first created are those which will embrace the streams whose waters have already been allotted by the District Court, the distribution of which shall, by the provisions of this chapter, be under the control of the water commissioners of the divisions in which such stream or streams are situated. Other districts shall be created from time to time as the appropriations and priorities thereof from the streams of this State shall be confirmed or adjudicated; Provided,* That when any company or association owning irrigation works whose water supply is not distributed under a sale or rental thereof, shall petition the water commis-

sioner to appoint a water master to take charge of the distribution of the water from such works, such water master shall be appointed, and he shall deliver to each user the quantity of water to which he may be entitled; and such water master so appointed shall be paid for such services in the manner provided in Sections 3279 and 3280; *Provided*, In the case of a stream whose waters have been allotted, when the distance between the extreme points of diversion of such stream is not more than thirty miles, the users of water from such stream may elect a water master to distribute the water of such stream, and fix his compensation therefor in the manner provided in the following section for the election of water masters.

Sec. 3275. For each water district created under the provisions of this chapter, there shall be appointed, on or before the first day of March of each year, one water master, who shall be appointed by the commissioner of the division in which the water district is situated. Each water master shall hold office for one year, or until his successor is appointed and shall have qualified. The said water commissioner may, at any time, remove any water master for failure to perform his duty as such water master, upon complaint in that respect being made to him in writing.

Before entering upon the duties of his office, said water master shall take and subscribe an

oath before some officer authorized by the laws of the State to administer oaths, to faithfully perform the duties of his office, and shall file with the Clerk of the District Court in the county in which said water master resides, said oath and his official bond in the penal sum of five hundred dollars, with not less than two sureties, to be approved by the judge of the probate court of the county in which he resides, and conditioned for the faithful discharge of the duties of his office; *Provided, That any vicinity or neighborhood, the inhabitants of which use the waters of any ditch, stream or spring for the purpose of irrigation, or have or claim a common right to the waters of any ditch, stream or spring for such purpose, provided the waters so claimed or used have not been allotted to the individual users thereof, shall constitute a water district,* and a majority of such water users having such common right may, annually, on the third Monday of February, at a meeting of such inhabitants, elect a water master for such district whose duty it shall be to superintend the distribution of such waters among those having such common right, or accustomed to participate in such common use. The water master of the district, or if there be no water master, or upon his failure or neglect to do so, any six residents of the district entitled to such common right, must give three days' public notice of the time and place of such election, by placing printed or written notices thereof in

three of the most public places in the district. Said meeting must be opened at ten o'clock in the forenoon, and the majority of those present who are entitled to such common right may organize the same and determine the manner of such election, and whether the same shall be by ballot or otherwise.

The water master must execute to the county in which his district is situated, and file in the office of the county recorder for the benefit of any person who may be injured by his wanton or illegal act or omission as such, a bond in the sum of five hundred dollars, with two sufficient sureties which shall be approved by the judge of the probate court of the county in which such district is situated, and conditioned for the faithful and impartial discharge of his duties as water master of his district, and any person so injured may have an action on such bond in his own name for his actual damages. Such water master may employ one or more deputies as authorized by the inhabitants of his district claiming such common right as aforesaid, and he is liable for their wanton or illegal acts upon his official bond, and before entering upon their duties the water master and his deputies must take and subscribe an oath, before any magistrate, to faithfully discharge the duties of their office, and they may receive such compensation, to be paid in such manner as may be agreed upon with such users, and shall have the same power as the water masters

appointed by the water commissioners under the provisions of this section. Said elected water master shall be under the direction and authority of the said water commissioner.

Such water master and his deputies must regulate the distribution of water among the several ditches of his district, and among the several water users who are entitled and accustomed to the use thereof, according to their respective rights and necessities, and when the quantity of water is not sufficient to afford a full supply to those entitled or accustomed to use the same, according to the usage of the district, such water master and his deputies must regulate the quantity used by each person, and the time at and during which each person may use the same; and such customs or usage must be upheld by the said water commissioners and by the courts of the State, when such customs have for their object the economical distribution of the waters of such district; *Provided,* Nothing in this section must be so construed as to *interfere with the vested rights of individuals, companies or corporations, or in any manner to interfere with the rights of individuals, companies or corporations, to the use and control of water, the right to the use of which is or may be their private property.*

Sec. 3277. It shall be the duty of said water master to divide the water in the natural stream or streams of his district among the several ditches taking water therefrom, according to the

prior rights of each respectively in whole or in part, and to shut and fasten, or cause to be shut and fastened, under the direction of the water commissioner of his water district, the headgates of ditches heading in any of the natural streams of the district, when, in times of scarcity of water, it is necessary so to do by reason of priority of rights of others taking water from the same stream or its tributaries.